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IN THE

Supreme Court of the United States

October Term, 1970

No. 488

WILLIAM ALMSTEAD,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT.

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Statement

Petitioner, WILLIAM ALMSTEAD, respectfully prays that this Court issue a Writ of Certiorari to review the Judgment and order of the Supreme Court of the State of New York, Appellate Division, Second Department, which affirmed the judgment of the County Court, Westchester County, convicting the petitioner, William Almstead, on the crimes of robbery, first degree; assault, second degree; and grand larceny, first degree, after trial before DICKENSON, J., and a jury. The defendant was sentenced to a term of twelve and one half (12½) years to twenty years on the

robbery charge; 2½ to 5 years on the larceny charge but the direction was for concurrent sentences. A suspended sentence was pronounced with respect to the assault.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1253.

The Court of Appeals of the State of New York denied leave to appeal on June 1st, 1970.

Questions Presented

1. Whether petitioner's constitutional rights were violated as a result of the pre-trial identification procedures employed in this case, namely, that the police brought the only alleged eye-witness to Manhattan from Westchester County to view the defendant alone, without a line-up?

2. Whether the defendant's constitutional rights under the Sixth Amendment were violated by failure to provide counsel and adequate warnings to him at the time of the alleged pre-trial identification by the victim, Massella?

3. Whether petitioner's constitutional rights were violated by failing to provide him an adjournment in order fo obtain witnesses in his behalf?

Constitutional and Statutory Provisions involved:

The Fifth, Sixth and Fourteenth Amendments, of the United States Constitution are herein involved.

Statement of the Case

The offices of the Westchester Street Transportation Company, a bus company, located at 450 E. Sanford Boulevard in Mt. Vernon, N. Y. was the scene of a robbery on September 21, 1966.

One Patsy Massella, the company's chief starter, or dispatcher, was seized from behind at about 8:10 a.m. at the office of the company and was hit on the side of the head by what he believed to be a gun.

He was unable to see his attacker and was told to open the safe (73-77)*.

Previously, that morning, Massella had prepared a bank deposit slip representing a total of $9,471.12 in bills and coin which was packaged in 16 canvas bags (58, 72).

He was ordered to open the safe but said he did not know the combination. For about 5 seconds he stood face to face with the robber and then knelt down and began to open the safe. (77-80).

The safe was finally opened and upon the thief's instructions, Massella, got up and was pushed back into the hall. He heard the thief call to someone else and a second person gaged Massella with a towel and tied his wrists and ankles together behind him with a length of double strand wire (83-86).

The twosome then took the 16 bags full of money and left (86-88) (108, 109).

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* Numerals in parenthesis refer to pages of the official court reporter's minutes of trial unless otherwise indicated.

The Petitioner presented an alibi defense that at the time of the alleged holdup he was at 146 Elm Street, and, therefore, could not have been at the scene of the robbery. (133, 153, 169).

At the trial, the defense (petitioner) sought to dismiss the indictment but coupled with that motion was an apparent effort to obtain an adjournment so that additional alibi witnesses, namely, the petitioner's two brothers, could testify in his behalf.

In a bill of particulars, the petitioner had set forth the names of both missing witnesses, that is his brothers, as "alibi" witnesses.

Unfortunately, these two important witnesses were not available at the time of trial but no adjournment was granted.

The two missing witnesses, of course, are now available.

POINT I

The Defendant-Petitioner's Constitutional Rights under the Sixth and Fourteenth Amendments of the United States Constitution were violated by the improper pre-trial identification procedures used in connection with this prosecution. Patsy Massella, the only prosecution witness, who could incriminate petitioner, was an elderly man who admitted that the police were highly suggestive in the pre-trial identification proceedings.

The victim of the alleged holdup, Patsy Massella, stated that he was 63 years old and further admitted that his identification of the petitioner was the result of having been led

by the police to a location for the purpose of making an identification of the petitioner alone.

In the pre-trial felony hearing, Massella declared that he had been shown *photographs* of the defendant and never saw the defendant in a "line-up". (F. H. 23-25).* (*Simmons v. United States*, 390 U.S. 377).

The following questions and answers at the felony hearing occurred (F. H. 25):

> "Q. You never identified Mr. Almstead in a line-up of people at Headquarters? A. No.
>
> Q. Right? A. Right.
>
> Q. And your alleged identification was the result of having been led to that place directly by the police, precisely for the reason, to make an identification? A. Right."

The witness, Patsy Massella, was unable to recognize a scar on the defendant's face from only two feet away. (F. H. 16)

Moreover, the witness was unable to recall whether or not the perpetrator of the crime had been wearing a hat. He could not give any information about the color of his hair or whether he was wearing a shirt or a raincoat.

In essence, his reliability as a person who could identify the defendant was almost ludicrous.

It is quite apparent that the defendant did not have counsel at the time the identification was made. Moreover, the rights to confrontation of witnesses was not explained to the defendant at that time either.

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* Numerals in parenthesis preceded by the letters F. H. refer to minutes of the felony hearing, otherwise they refer to the Trial Transcript.

In addition, the police brought this witness, the *only* witness, to a place to identify the defendant telling him in advance that he was going to see a "suspect" in the investigation of the robbery.

It is undisputed that petitioner had no counsel and was not told of his rights.

With this highly suggestive one-man viewing, it is difficult to believe that the witness would have come to any other conclusion that to identify the petitioner as the robber.

In the *United States* v. *Wade*, 388 U.S. 218, and *Gilbert* v. *California*, 388 U.S. 263, the Supreme Court of the United States lays down certain guide posts for identification procedures. Those cases condemned unnecessarily suggestive pre-trial identification procedures.

In *Stovall* v. *Denno*, 388 U.S. 293, 301, 302, the Supreme Court of the United States declared that even in earlier cases, the "inquiry is whether 'the confrontation . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that (defendant) was denied due process of law' ".

Some of the items that are important are whether or not there was a line-up and whether or not the witness for the prosecution who made the identification saw the suspect in a line-up and in addition what the circumstances may have been.

It is undisputed that no line-up procedure was conducted. As a matter of fact, the police brought the victim to another public building where they told him that he was going to view the suspect. The petitioner, of course, had no opportunity to consult counsel and was not even advised of his

constitutional rights in that regard. At least two days elapsed before the victim was brought to identify the defendant-petitioner. The victim had been shown photos of petitioner. (*Simmons* v. *United States, supra*).

Since the petitioner was in custody at the time of the identification was made, i.e., he had been seized in a public building by the police, there was no reason to have eliminated a line-up. Arrangements could easily have been made to do so.

In short, it is quite evident that the defendant was denied his constitutional rights in the identification procedures.

POINT II

The state trial court erred in refusing to grant an adjournment to the Defendant-Petitioner for the purpose of securing two alibi witnesses who could have corroborated the fact that he could not have committed the crime if they had been called.

It is elementary that a fair trial includes the right to compel the attendance of witnesses in one's behalf (6th Amendment, United States Constitution). As a matter of fact, the cases of *Smith* v. *Illinois*, 390 U.S. 129, 131, 132 and *Alford* v. *United States*, 282 U.S. 267, stand for the proposition that witnesses are essential to protect the rights of the defendant in a criminal trial. While those cases are not necessarily directly involved with the issue here present, nonetheless, the general principal is well explained in those particular decisions.

In *Mesarosh* v. *United States*, 352 U.S. 1, the Supreme Court condemned any procedure which is fundamentally unfair to a defendant. The adjournment requested should have

been granted because the crime charged was very serious and if alibi witnesses, who incidentally were disclosed in a bill of particulars by the defendant in advance of trial, could have proved his innocence, they should have been permitted to testify.

In the final analysis the fundamental rights of this petitioner were violated because he was not permitted to compel the attendance of witnesses whose names he had disclosed in advance of trial and whom he identified as essential alibi witnesses.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

Certificate Denying Leave

STATE OF NEW YORK

COURT OF APPEALS

Before:

HON. ADRIAN P. BURKE,

Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

WILLIAM ALMSTEAD,

Defendant-Appellant.

I, ADRIAN P. BURKE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to § 520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
June 1, 1970

ADRIAN P. BURKE,
Associate Judge

Order

NEW YORK SUPREME COURT

APPELLATE DIVISION—SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

WILLIAM KENNY ALMSTEAD,

Defendant-Appellant.

Before CHRIST, P.J.: RABIN; HOPKINS; BRENNAN, JJ. (Beldock, P.J. deceased).

"Judgment of the County Court, Westchester County, rendered December 6, 1968, affirmed. No Opinion."

(The foregoing order was published in the New York Law Journal on the 22nd of April, 1970)